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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Isaiah D., Minor.	D044161
SAN DIEGO COUNTY HEALTH & HUMAN SERVICES AGENCY, Petitioner and Respondent, v. TAMMY C., Objector and Appellant.	(San Diego County Super. Ct. No. J512-018E)

APPEAL from an order of the Superior Court of San Diego County, William E. Lehnhardt, Judge. (Retired judge of the Imperial Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.) Affirmed in part, reversed in part and remanded with directions.

In the juvenile dependency matter regarding her son Isaiah D., Tammy C. (Mother) appeals orders of the juvenile court denying her Welfare and Institutions Code

section 388[1] petition without a hearing and terminating her parental rights. On appeal, Mother contends: (1) because she presented a prima facie case, the court erred by denying her section 388 modification petition without a hearing; (2) because substantial evidence does not support the court's finding that Isaiah would not benefit from continuing his relationship with Mother within the meaning of section 366.26, subdivision (c)(1)(A), the court erred by terminating her parental rights; and (3) because the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) were not satisfied, the court's parental rights termination order must be reversed and the matter remanded for compliance with ICWA's notice requirements.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2003, Mother gave birth to Isaiah. Both tested positive for cocaine. On June 3 the San Diego County Health and Human Services Agency (Agency) filed a dependency petition on Isaiah's behalf under section 300, subdivision (b). The petition alleged: (1) both Isaiah and Mother tested positive for cocaine; (2) Mother admitted drug use during her pregnancy; (3) four of Isaiah's siblings had been removed from Mother's custody; and (4) one of his siblings tested positive for cocaine at his birth in April 2001. The petition also alleged that V., the alleged father (Father), admitted he had a history of drug use. Agency's detention report stated Mother had custody of Leandrea, Isaiah's fifth sibling, who was born in 1989. The report also noted that although Mother denied having any American Indian heritage, she believed Isaiah's paternal relatives had American

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1 All statutory references are to the Welfare and Institutions Code.

Indian heritage. Mother submitted a form identifying Cherokee or Choctaw tribes as possible paternal heritage for Isaiah. Father submitted a form stating he had American Indian heritage, but did not identify any tribe.

At the June 3 detention hearing, the court found Agency had established a prima facie case for Isaiah's detention and issued an order for his detention in out-of-home care. The court also found ICWA may apply in this case and ordered Father to submit to paternity testing.[2] It granted Mother and Father the right to supervised visitation with Isaiah.

On June 23 Agency filed a jurisdiction and disposition report noting Isaiah had been detained with nonrelative extended family members. Isaiah's paternal grandmother stated she believed none of her family members were registered with a tribe. Agency reported Mother had three felony convictions for possession of narcotics and two misdemeanor convictions for being under the influence of a controlled substance. Mother has used cocaine since at least 1996 and admitted she currently abused controlled substances. Mother had been offered reunification services regarding two other children with whom she did not reunify, and those services were terminated. Her parental rights to three children had been terminated within the past three years. Based on those facts, Agency recommended the court deny Mother reunification services in Isaiah's case and set a section 366.26 hearing.

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2 On June 24 the court found Father was Isaiah's biological father.

On July 25 Agency filed an addendum to its original report, noting Mother tested positive for cocaine on June 19. Isaiah's caretakers reported Mother and Father visited Isaiah only once since his detention in their home over a month before, and his caretakers expressed an interest in adopting Isaiah. On July 23 Leandrea, the only child remaining in Mother's custody, stated Mother was using drugs again and bought drugs while in her presence. Leandrea was taken into protective custody and detained with a nonrelative family member.

At the August 13 contested jurisdiction and disposition hearing, the court took judicial notice of the pleadings in the dependency cases involving Isaiah's siblings. The court sustained the petition and found Isaiah was a person described in section 300, subdivision (b). The court placed Isaiah with a nonrelative extended family member, denied reunification services to Mother and Father, and set a section 366.26 hearing. After we granted Father's writ petition alleging inadequate notice under ICWA, the court vacated its dispositional orders and its order setting the section 366.26 hearing.

On December 8 Agency filed a report stating that Mother rarely missed her twice-a-week supervised visits with Isaiah. Her conduct was appropriate during visits. She attended to Isaiah's needs and helped with feeding him and changing his diapers. Isaiah's caretakers since June 2003 were motivated to adopt him and provided him with a loving, stable environment in which he was flourishing. Agency recommended Mother's and Father's parental rights be terminated and a permanent plan of adoption be selected for Isaiah.

At the January 7, 2004 disposition hearing, the court found adequate ICWA notice had been given and ICWA did not apply. The court declared Isaiah a dependent child and placed him with a nonrelative extended family member. It denied reunification services to Mother and Father and set a section 366.26 hearing.

On January 23 Mother filed a section 388 petition seeking to modify the court's January 7 order to provide her six months of reunification services and vacate its order setting a section 366.26 hearing. Her petition alleged she had been developing a good relationship with Isaiah and had completed parenting, life skills, and adult-infant CPR classes. It also alleged she had been attending "AfterCare" at the McAlister Institute.

On March 25 the court heard argument of counsel on the issue of whether Mother's section 388 petition stated a prima facie case for modification of the January 7 order. Finding Mother's section 388 petition did not state a prima facie case, the court denied it without holding an evidentiary hearing.

At the April 12 contested section 366.26 hearing, the court admitted into evidence Agency's reports and heard the testimonies of Mother and David Smith, an Agency social worker. The court found Isaiah to be an adoptable child and adoption was in his best interests. Finding no circumstances under section 366.26 made parental right termination detrimental to Isaiah, the court terminated Mother's and Father's parental rights and selected a permanent plan of adoption for Isaiah.

Mother timely filed a notice of appeal.

DISCUSSION

I

Section 388 Petition

Mother contends because her section 388 petition stated a prima facie case for modification of the January 7, 2004 order, the court erred by denying it without conducting an evidentiary hearing.

A

On January 23, 2004, Mother filed a section 388 petition seeking modification of the court's January 7 order that denied her reunification services and set a section 366.26 hearing. Her section 388 petition sought to modify the January 7 order to provide her six months of reunification services and vacate the order setting a section 366.26 hearing. In support of the requested modification, the petition alleged the following *changed circumstances*:

> "Mother has effectively dealt with factors which made this a case by: 1) developing a good relationship with [Isaiah], 2) completing a 'Parenting Class' on 1/6/04, 3) completing a 'Life's Skills' course via [McAlister] Institute on 12/2/03, [and] 4) completing an 'Adult-Infant CPR' course on 12/15/03 and by attending 'AfterCare' at [McAlister].

The petition alleged the requested modification of the January 7 order was in Isaiah's best interests because: "[Isaiah] has begun to bond with [Mother] and vice versa and [Mother] is the natural mother, has been rehabilitated and has the means and energy level to safely parent [Isaiah]." Attachments to Mother's section 388 petition included certificates showing her completion of the parenting, life skills, and adult-infant CPR classes. Also

attached to the petition was a letter dated January 6, 2004, from a McAlister Institute treatment counselor, stating:

> "[Mother] enrolled in McAlister Institute Options South Bay on 8-06-03. [She] successfully completed all requirements for the program on 01-8-04 [sic] will be attending aftercare 2 days a week.
>
> "MITE Options South Bay runs Monday through Friday from 10:00 a.m. until 3:00 p.m. Our program curriculum consists of Parenting classes, Drug Education, Life Skills, Introduction to 12-Step recovery, HIV Education and Nutrition. We also offer Aftercare, Anger Management and Dual Diagnosed programs. In addition, we provide both group and individual counseling. Childcare is available. We also do random urinalysis testing on site. This is a six[-]month program plus 90 days of aftercare."

At the March 25 pretrial conference, the court invited counsel to argue the issue of whether Mother's section 388 petition stated a prima facie case for modification of the January 7 order. Agency's counsel argued that "the *change* of circumstances that are needed to be shown would be *from January 7*, [2004,]. . . the date [on which] . . . the court set the [section 366.26] hearing and offered no [reunification] services." (Italics added.) She then noted that the three classes cited in Mother's section 388 petition were completed on December 3, 2003, December 15, 2003, and January 6, 2004. She argued Mother's petition did not make a showing of either changed circumstances or that the requested modification would be in Isaiah's best interests. Isaiah's counsel joined in the arguments of Agency's counsel. In response, Mother's counsel argued she is still attending and benefiting from aftercare. He also moved to amend Mother's section 388 petition to allege the additional changed circumstance that Mother had continued her therapy with Dr. Lazar. He argued that because Isaiah had begun to bond with Mother, it

would be in Isaiah's best interests to modify the January 7 order.[3] The court granted Mother's motion to amend her petition, but nevertheless concluded: "I find the [section] 388 petition has failed to meet the prima facie test and it will not be a part of the contested hearing." The court stated: "There is an insufficient showing of changed circumstances that it would be in the best interests of the child to modify the orders as requested."

B

Section 388 provides:

> "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition . . . shall set forth in concise language any change of circumstance or new evidence which are [sic] alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶]
>
> "(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . , the court shall order that a hearing be held . . . ."

A section 388 petition may seek "to change or set aside any order of the juvenile court in the action from the time the child is made a dependent child of the juvenile court [citations] . . . . [¶] The petition for modification must contain a 'concise statement of any change of circumstance or new evidence that requires changing the [previous] order.' (Cal. Rules of Court, rule 1432(a)(6).)" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

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3 Father's counsel also argued in support of Mother's section 388 petition.

"The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance[s] or new evidence and that modification would promote the child's best interests. [Citations.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) "The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) A decision on a section 388 petition *after an evidentiary hearing* is "committed to the sound discretion of the juvenile court, and [that] court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

"[T]o be entitled to a hearing on a [section 388] petition for modification, a parent must show changed circumstances and it must appear that the best interests of the child may be served by a change in the order." (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) Section 388 petitions "are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.) As we noted in *In re Heather P.* (1989) 209 Cal.App.3d 886: "[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing." (*Id*. at p. 891.) However, "[i]f the petition fails to state a change of circumstance or new evidence that might require a change of order or termination of jurisdiction, the court may deny the application ex parte." (Cal. Rules of Court, rule 1432(b).)

Although many courts of appeal, including this one, have stated that a juvenile court has *discretion* whether to conduct an evidentiary hearing on a section 388 petition, those statements appear to have been made summarily without substantive analysis and many of those statements merely perpetuated prior summary statements or were based on misinterpretations of cases cited in support. (See, e.g., *In re Angel B.* (2002) 97 Cal.App.4th 454, 460 [in which the court stated, "[w]e review such a summary denial [of a section 388 petition] for abuse of discretion," citing only *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 in support]; *In re Anthony W.*, *supra*, at p. 250 [in which the court stated, "[w]e review the juvenile court's summary denial of a section 388 petition for abuse of discretion," citing only *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413 in support]; *In re Aljamie D.*, *supra*, 84 Cal.App.4th at p. 431 [in which the court summarily stated, "[t]he juvenile court has discretion whether to provide a hearing on a petition alleging changed circumstances," without substantive analysis or citation to a supporting case]; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808 [in which the court summarily stated, "[w]e find no abuse of discretion in the court's ruling [denying a section 388 petition without a hearing]," without substantive analysis or citation to a supporting case]; *In re Jeremy W.*, *supra*, at p. 1413 [in which we stated, "[w]e have previously determined section 388 is not facially unconstitutional, because it gives the court discretion whether to provide a hearing on a petition alleging changed circumstances," citing *In re Heather P.*, *supra*, 209 Cal.App.3d at p. 891].)

For example, although in *In re Jeremy W.*, *supra*, 3 Cal.App.4th 1407, we cited *In re Heather P.*, *supra*, 209 Cal.App.3d 886 in support of our statement that a juvenile

court has "discretion whether to provide a hearing" on a section 388 petition, a close reading of *In re Heather P.* does *not* provide *any* support for that statement. (*In re Jeremy W.*, *supra*, at p. 1413.) Rather, in *In re Heather P.*, *supra*, 209 Cal.App.3d 886, we rejected the mother's claim that section 388's procedure is "inadequate to protect her due process rights because it gives the court discretion to determine whether to grant a hearing." (*Id*. at p. 891.) We stated: "[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court *will* order the hearing." (*Ibid*., italics added.) We also stated: "If the court determines the best interests of the child may be promoted by any of these changes [e.g., modification of a court order], *it must order a hearing on the matter*." (*Ibid*., italics added, fn. omitted.) *In re Heather P.* does not contain any language to support an inference that a juvenile court has *discretion* whether to conduct an evidentiary hearing on a section 388 petition. On the contrary, its language clearly implies that if a section 388 petition states a prima facie case for modification of a prior court order, a juvenile court must, as a matter of law, conduct an evidentiary hearing on that petition.

Furthermore, both statutory and case precedent support that position. Section 388, subdivision (c) states: "If it appears that the best interests of the child may be promoted by the proposed change of order . . . , *the court shall order that a hearing be held* . . . ." (Italics added.) As noted *ante*, the California Supreme Court has stated: "The parent need only make a prima facie showing to trigger the *right to* proceed by way of *a full hearing*. [Citation.]" (*In re Marilyn H., supra,* 5 Cal.4th at p. 310, italics added.)

Generally, it is a question of law whether a petition or other pleading on its face states a prima facie case. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) However, in this case it is unnecessary to decide whether, on appeal from a juvenile court's denial of a section 388 petition without an evidentiary hearing, we apply a de novo, or abuse of discretion, standard of review to determine whether that petition made a prima facie showing.

In the circumstances of this case, we conclude Mother's section 388 petition, as originally filed on January 23, 2004, and as subsequently amended, did *not*, whether considered an issue within the discretion of the juvenile court or as to be reviewed de novo, make a prima facie showing for modification of the juvenile court's January 7 order. First, her petition did not allege a sufficient change of circumstances to make a prima facie showing for modification of the January 7 order. It is implicit in the language of section 388 that the alleged *change* of circumstances must have occurred *after* issuance of the order the petitioner seeks to modify. Therefore, to state a prima facie case for modification of the January 7 order, Mother's section 388 petition must allege a significant change of circumstances during the 16-day period between January 7, when the order was issued, and January 23, when the petition was filed. However, three of the four changes of circumstances alleged in Mother's petition occurred on or before the date of issuance of the order sought to be modified (i.e., January 7). The petition alleged Mother completed a life skills class on December 2, 2003, an adult-infant CPR class on December 15, 2003, and a parenting class on January 6, 2004. All three of those alleged changed circumstances occurred *before* issuance of the January 7, 2004 order Mother's

petition sought to modify and therefore cannot, as a matter of law, constitute a change of circumstances under section 388. The petition's fourth alleged change of circumstance was that Mother is "developing a good relationship with [Isaiah]." However, that allegation, considering the record favorably to Mother, did not constitute a sufficient change of circumstance under section 388. The record showed that prior to the January 7 order, Mother had regularly been visiting Isaiah twice weekly and presumably developed a relationship with him as a result of those visits. However, absent a specific factual allegation showing a significant change in the nature of that relationship between January 7 and January 23, we cannot presume a sufficient change *had occurred* in that relationship as a result of Mother's visits with Isaiah during the 16-day period between the January 7 order and her January 23 petition. Therefore, the allegation in Mother's section 388 petition that she was "developing a good relationship" with Isaiah did not allege a sufficient change of circumstance to make a prima facie showing for modification of the January 7 order.

Furthermore, at the March 25 hearing the juvenile court granted Mother's request to amend her section 388 petition to allege the additional changed circumstance that Mother had continued her therapy with Dr. Lazar.[4] However, mere continuation of therapy is not a sufficient showing of changed circumstances for modification of an order under section 388. Continuation of her drug abuse aftercare therapy constituted, at most,

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4 That therapy presumably was part of her continued aftercare to which her counsel referred at the hearing.

a showing of only changing, and not changed, circumstances. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) Therefore, Mother's amended section 388 petition did not allege sufficient changed circumstances for modification of the January 7 order.

In addition, Mother's section 388 petition did not show it may be in Isaiah's best interests to modify the January 7 order. Her petition alleged modification of the January 7 order would be in Isaiah's best interests because he "has begun to bond with [Mother] and vice versa and . . . [Mother] has been rehabilitated and has the means and energy level to safely parent [Isaiah]." Construing the petition's allegations liberally in Mother's favor, those allegations nevertheless are insufficient to show a modification of the January 7 order may be in Isaiah's best interests. The petition's allegation that Isaiah "has begun to bond" with Mother shows, at most, the beginning of a change, or changing, circumstances. "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

In the circumstances of this case, Isaiah's *beginning* of a bonding process with Mother is insufficient to show it may in his best interests for the court to grant Mother six months of reunification services and vacate the setting of the section 366.26 hearing, as requested by Mother's section 388 petition. Furthermore, Mother's allegations of rehabilitation and sufficient "means and energy" do not show it may be in Isaiah's best interests to modify the January 7 order. Without more specific factual allegations

showing a significant change of circumstances since the January 7 order, Mother's general allegations of her alleged rehabilitation and sufficient means and energy presumably could not have changed sufficiently over the subsequent 16-day period to make any significant change in the juvenile court's analysis of Isaiah's best interests.

Whether on our independent review of Mother's section 388 petition and her subsequent amendment thereof or as a matter within the discretion of the juvenile court, we conclude her petition did not make a prima facie showing for modification of the January 7 order. The juvenile court properly denied the petition without conducting an evidentiary hearing.[5]

II

Section 366.26, Subdivision (c)(1)(A)

Mother contends substantial evidence does not support the juvenile court's finding that the section 366.26, subdivision (c)(1)(A) exception to termination of her parental rights did not apply.

A

At the April 12 contested section 366.26 hearing, the court admitted into evidence Agency's reports and heard the testimonies of Mother and Smith, the Agency social

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5 Because we have concluded the court properly denied Mother's section 388 petition without an evidentiary hearing, we necessarily reject her additional assertion that her constitutional due process rights were violated by the court's denial of her petition without a hearing. (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 306-310; *In re Angel B.*, *supra*, 97 Cal.App.4th at pp. 460-461; cf. *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800; *In re Jeremy W.*, *supra*, 3 Cal.App.4th at p. 1416.)

worker. The court found Isaiah to be an adoptable child and adoption was in his best interests. Finding no circumstances under section 366.26 made parental right termination detrimental to Isaiah, the court terminated Mother's and Father's parental rights and selected a permanent plan of adoption for Isaiah.

B

"At a section 366.26 hearing, once [Agency] has shown it is likely the child will be adopted, the burden shifts to the parents to prove that termination of parental rights would be detrimental to the child based on one of the exceptions enumerated in [section 366.26,] subdivision (c)(1). [Citations.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) "The party claiming an exception to adoption has the burden of proof to establish by a preponderance of evidence that the exception applies. [Citations.]" (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.) Section 366.26, subdivision (c)(1) provides:

> "If the court determines, based on the assessment provided . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . A finding . . . that reunification services shall not be offered . . . or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:
>
> "(A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. . . ."

"To meet the burden of proof for the section 366.26, subdivision (c)(1)(A) exception, the parent must show more than frequent and loving contact or pleasant visits. [Citation.]

'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.]' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.)

In re Autumn H. (1994) 27 Cal.App.4th 567 stated:

> "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. [¶] . . . [¶] . . . The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id*. at pp. 575-576.)

On an appeal challenging a juvenile court's decision that a section 366.26, subdivision (c)(1) exception does not apply, we review the record to determine whether there is substantial evidence to support a finding that the exception does not apply. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 947; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) As we stated in *In re L.Y.L.*:

> "If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if

> supported by substantial evidence even if other evidence [would have supported] a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]" (*In re L.Y.L.*, *supra*, at p. 947.)

C

Mother cites evidence in the record to support a finding by the juvenile court that the section 366.26, subdivision (c)(1)(A) exception applies. However, in so doing, she either misconstrues or misapplies the substantial evidence standard of review. On appeal, we do not review the record to determine whether there is substantial evidence to support a contrary finding by the juvenile court (i.e., the section 366.26, subdivision (c)(1)(A) exception applies), but rather we review the entire record to determine whether there is substantial evidence to support the finding the court made (i.e., the section 366.26, subdivision (c)(1)(A) exception does not apply). (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 947; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Considering the record favorably to support the juvenile court's finding, we conclude there is substantial evidence to support its finding that the section 366.26, subdivision (c)(1)(A) exception does not apply in this case. We presume, as Agency apparently concedes, that Mother had sufficient regular contact and visitation with Isaiah for purposes of the section 366.26, subdivision (c)(1)(A) exception. However, there is substantial evidence to support a finding by the juvenile court that Isaiah would not "benefit from continuing the relationship" with Mother within the meaning of that subdivision. (§ 366.26, subd. (c)(1)(A).) Smith, the Agency social worker, testified he observed Isaiah and Mother interact during one of her recent two-hour visits. According to Smith's written report, he

observed numerous occasions during which Isaiah resisted or became anxious when Mother attempted to pick him up from his caregivers. Based on his observations and information he received from Isaiah's caregivers, Smith stated his opinion that Mother did not have a parental relationship with Isaiah and Isaiah had not closely bonded with her. Although Isaiah recognized Mother and called her "mama," that does not necessarily show Mother had a parental relationship with him.

Furthermore, the record showed Mother's history of substance abuse and loss of custody of her other children. Accordingly, the juvenile court could reasonably infer from the evidence that Mother did not "occup[y] a parental role in [Isaiah's] life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954.) Furthermore, balancing "the strength and quality of the natural parent/child relationship in a tenuous placement [with Mother] against the security and the sense of belonging a new [adoptive] family would confer," the juvenile court could reasonably conclude termination of Isaiah's relationship with Mother would not be detrimental to him. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) Therefore, there is substantial evidence to support the court's finding that the section 366.26, subdivision (c)(1)(A) exception does not apply.[6]

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6 *In re Brandon C.* (1999) 71 Cal.App.4th 1530, cited by Mother, is inapposite because, unlike in this case, the juvenile court found the section 366.26, subdivision (c)(1)(A) exception applied. (*Id*. at p. 1533.) Accordingly, the appellate court reviewed the record to determine whether there was substantial evidence to support the finding that the section 366.26, subdivision (c)(1)(A) exception *applied*. (*Id*. at pp. 1534-1538.)

III

ICWA Notice

Mother contends Agency did not comply with the notice requirements of ICWA (25 U.S.C. § 1901 et seq.) because the notice it mailed to the tribes did not list the names of Isaiah's paternal grandparents, his paternal grandmother's maiden name, or her date of birth. Mother also asserts Agency did not file with the juvenile court the responses it received from the tribes.

A

ICWA "sets forth the manner in which a tribe may obtain jurisdiction over child custody proceedings involving an 'Indian child' or intervene in the state court proceedings. The notice requirements of the ICWA ensure a tribe will have 'the opportunity to assert its rights' under the statute." (*In re C.D.* (2003) 110 Cal.App.4th 214, 222, fns. omitted.) Regarding the content of the notice required under ICWA, we stated in *In re S.M.* (2004) 118 Cal.App.4th 1108:

> "Notice is meaningless if no information or insufficient information is presented to the tribe. [Citation.] The notice must include the name, birthdate, and birthplace of the Indian child; his or her tribal affiliation; a copy of the dependency petition; the petitioner's name; a statement of the right [of] the tribe to intervene in the proceeding; and information about the Indian child's biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases, birthdates, places of birth and death, current and former addresses, tribal enrollment numbers, and/or other identifying information. [Citations.]" (*Id*. at p. 1116, fn. omitted.)

"Most appellate courts considering the issue have held the ICWA notice, and return receipts and responses of the [United States Bureau of Indian Affairs] or tribe, if any,

must be filed with the juvenile court." (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175-176.)

B

The record in this case shows that in December 2003 Agency mailed notices to three Choctaw tribes, four Cherokee tribes, and the United States Bureau of Indian Affairs (BIA) on State of California Health and Welfare Agency Form SOC 319 (Form SOC 319), titled "Notice of Involuntary Child Custody Proceeding Involving an Indian Child." However, that form does not contain any blanks prompting or allowing for insertion of information regarding an Indian child's grandparents.

At the January 7, 2004 disposition hearing, the court found adequate ICWA notice had been given and ICWA did not apply. The court declared Isaiah a dependent child and placed him with a nonrelative extended family member. It denied reunification services to Mother and Father and set a section 366.26 hearing.

At the April 12 contested section 366.26 hearing, the court found Isaiah to be an adoptable child and adoption was in his best interests, terminated Mother's and Father's parental rights, and selected a permanent plan of adoption for Isaiah.

C

Mother asserts, and Agency concedes, that the record on appeal does not show ICWA's notice requirements were satisfied in this case. In *In re Karla C.*, *supra*, 113 Cal.App.4th 166, we stated:

> "[F]orm SOC 319 is deficient in that it does not contain a space for the names and addresses of grandparents and great grandparents, and other identifying information, if known, as required by 25 Code of

> Federal Regulations part 23.11(d)(3) (2003). The deficiency may be cured, however, if the social services agency also sends the tribe form SOC 318, which includes spaces for the information required by 25 Code of Federal Regulations part 23.11(d)(3) (2003). [Citation.]" (*Id*. at p. 176, fn. omitted.)

Because the record does not show Agency mailed Form SOC 318 or another form listing the names and addresses of Isaiah's grandparents and setting forth other information required by ICWA and regulations promulgated thereunder, the juvenile court erred by finding ICWA's notice requirements were satisfied and ICWA did not apply.

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Mother argues, because ICWA's notice requirements were not satisfied, the juvenile court's order terminating her and Father's parental rights, and all orders issued prior thereto, must be reversed and the matter remanded for proper notice to be given and for further proceedings. Although we agree the order terminating parental rights must be reversed and the matter remanded for proper ICWA notice to be given, we believe it is premature to reverse all orders issued prior to the order terminating parental rights. (*In re S.M., supra,* 118 Cal.App.4th at p. 1119, fn. 6; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 261; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 740; cf. *In re Desiree F.* (2000) 83 Cal.App.4th 460, 477-478.) In the event a tribe or the BIA intervenes in this case after receipt of proper notice, the parties and juvenile court should then address the issue of which prior orders should be vacated or modified.

DISPOSITION

The order denying Mother's section 388 petition is affirmed. The order terminating parental rights is reversed and the matter is remanded with directions that the

juvenile court order Agency to comply with the notice requirements of ICWA. If, after receiving proper notice, neither the BIA nor any tribe intervenes, the court shall reinstate its order terminating parental rights.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.